

**International Brotherhood of Electrical Workers,  
Local 236, AFL-CIO and Frederick M. Nirsberger.** Case 3-CA-23141

August 21, 2003

**DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS WALSH  
AND ACOSTA

On January 2, 2002, Administrative Law Judge Joel P. Biblowitz issued the attached decision. In his decision, the judge concluded that, contrary to the complaint, employee Frederick Nirsberger forfeited his right to co-worker representation under *Epilepsy Foundation of Northeast Ohio*<sup>1</sup> by insisting on a representative who was unavailable to be present during the investigatory interview. The General Counsel filed exceptions to the judge's decision, and the Respondent filed cross-exceptions. Both parties filed supporting briefs.<sup>2</sup>

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>3</sup> and conclusions and adopt the recommended Order.

**I. FACTS**

Since its formation in February 1999, Respondent International Brotherhood of Electrical Workers, Local 236 has employed Fredrick Nirsberger as an assistant business manager. In September 2000, after a heated election contest, Tim Paley was elected the Respondent's business manager with full authority over all personnel matters. Although Nirsberger supported Paley's opponent in

the election, Paley nevertheless decided to retain Nirsberger in his position after the election. In the months following Nirsberger's retention, however, Paley and Nirsberger clashed over a variety of matters, including Nirsberger's attendance record, his ability to follow work rules, and his perceived general reluctance to be a "team player."

On December 29, 2000, Paley summoned Nirsberger and fellow Assistant Business Manager Don Rahm to a meeting to discuss Nirsberger's absenteeism and other performance issues. When Nirsberger and Rahm arrived, Paley began the meeting by stating that he "could have terminated" Nirsberger when he first became business manager. Nirsberger immediately said that he did not like where the conversation was going, and was "not going to say another word until" he had a representative present. As Paley continued speaking, Nirsberger interrupted, asserting, "Listen, do you know what I'm saying, I'm invoking my *Weingarten* rights."

Paley asked Nirsberger whom he wanted to represent him, and he asked for Jerry Comer. Comer works for the International Brotherhood of Electrical Workers, not for Respondent Local 236. He is an International Representative of the IBEW, and, in that position, acts as a liaison between the International and its local unions. He works out of his home in Syracuse, New York, 120 miles and over 2 hours' drive from Respondent's offices. In response to Nirsberger's request for representation by Comer, Paley told Nirsberger: "You can have anybody you want here, but I want to finish this conversation." Nirsberger refused to continue the conversation without Comer and left the office. Within minutes, Paley discharged Nirsberger.

The judge dismissed the 8(a)(1) complaint alleging that the Respondent terminated Nirsberger's employment for requesting coworker representation during the meeting with Paley. The judge concluded that, because Comer worked in Syracuse, Nirsberger's insistence on Comer's presence "would have required, at least, a three hour delay in the meeting." According to the judge, "the Respondent was not obligated to delay the meeting." He therefore concluded that Respondent had lawfully terminated Nirsberger.

The Respondent renews the contention, on which the judge did not pass, that the Act did not protect Nirsberger's request for Comer's representation because Comer was not Nirsberger's coworker. We agree. Accordingly, we affirm the judge's recommended Order dismissing the complaint in its entirety.

**Analysis**

Section 7 of the Act provides that employees "shall have the right to self-organization, to form, join, or assist

<sup>1</sup> 331 NLRB 676 (2000), *enfd.* in relevant part 268 F.3d 1095 (D.C. Cir. 2001).

<sup>2</sup> On March 6, 2003, the Board granted the joint request of LPA, Inc., The Equal Employment Advisory Council, Associated Builders and Contractors, the Chamber of Commerce of the United States, the Society for Human Resource Management, the International Mass Retail Association, and the National Association of Manufacturers to file an amicus brief and accepted the brief that accompanied that request.

On March 19, 2003, the Board granted the request of the Council on Labor Law Equity (COLLE) to file an amicus brief and accepted the brief that accompanied that request.

On April 4, 2003, Wal-Mart Stores, Inc., filed a response in support of briefs amici curiae and a request for oral argument. The request for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

<sup>3</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. See *Standard Dry Wall Products*, 91 NLRB 544, 544-545 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .” In *NLRB v. Weingarten*,<sup>4</sup> the Supreme Court held that the Board permissibly construed Section 7 to grant an employee the right to a union representative at any investigatory interview that the employee reasonably believed might result in disciplinary action.<sup>5</sup> As the Court explained, “[t]he action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 . . . .”<sup>6</sup>

Unresolved in *Weingarten*, however, was the broader question of whether *nonunionized* employees—who also enjoy the protection of Section 7—possess the right to have a coworker present during disciplinary investigations. In *Epilepsy Foundation*,<sup>7</sup> the Board held that, even though the Act is susceptible to other reasonable constructions, “the rule enunciated in *Weingarten* applies to employees not represented by a union as well as to those that are.”<sup>8</sup> Accordingly, under *Epilepsy Foundation*, an employee has the right to request the presence of a coworker during any investigatory interview that may reasonably lead to discipline.<sup>9</sup>

Here, invoking *Epilepsy Foundation*, the General Counsel asserts that Nirsberger’s request for representation by Comer was protected under Section 7. The record affirmatively demonstrates, however, that Comer was not Nirsberger’s coworker. As the judge explained, Comer is an international representative of the IBEW, which is not the employer here. Comer is paid by the International, not the Respondent, and he reports to an International vice president. Notably, Nirsberger explained at the hearing that he requested Comer’s presence precisely because Comer did not work for the Respondent. Rather, because Comer worked for the International (the parent of, but separate entity from, the Local), Nirsberger felt that Comer would be better able to mediate the conflict.

Under these circumstances, we find that Nirsberger did not act in a concerted manner with a coworker for mutual aid or protection. Comer, although not a wholly disinterested third party, was not Nirsberger’s coworker. Nirs-

berger’s request for Comer, although rational, was “not bottomed upon acting in concert for mutual aid and protection as guaranteed in Section 7,”<sup>10</sup> but constituted, in essence, a request for “personal and private assistance.”<sup>11</sup> As such, Respondent’s consent to Nirsberger’s request was not compelled by Section 7.<sup>12</sup>

The General Counsel nevertheless contends that Nirsberger’s discharge was unlawful because Respondent terminated Nirsberger solely for invoking his *Weingarten* rights, not for requesting a third-party representative. We agree that, had Nirsberger been terminated merely for requesting coworker representation, Respondent would have violated the Act.<sup>13</sup> The record establishes, however, that Nirsberger was terminated not merely for requesting representation, but for insisting on the presence of Comer as his chosen representative. Indeed, Paley was receptive to Nirsberger’s request for representation, asking Nirsberger whom he would like to represent him. It was only after Nirsberger refused to participate in the meeting, insisting on representation by Comer, that Paley made the decision to terminate him. On these facts, we conclude that Paley fired Nirsberger for insisting on third-party representation, not for invoking rights protected under *Epilepsy Foundation*.<sup>14</sup>

#### ORDER

The complaint is dismissed.

<sup>10</sup> *McLean Hospital*, 264 NLRB 459, 472 (1982).

<sup>11</sup> *TCC Center Co.*, 275 NLRB 604, 609 (1985). See also *Consolidated Casinos Corp.*, 266 NLRB 988, 1008 (1983) (“An employee who requests the presence of his personal lawyer . . . is not invoking the support of the lawyer as part of a common cause with others. The lawyer is for his personal assistance.”).

<sup>12</sup> A request by one statutory employee for assistance from another statutory employee (albeit of a different employer) can constitute concerted protected activity. Thus, it may well be that Nirsberger could not be fired for making the request.

<sup>13</sup> See *E. I. du Pont & Co.*, 289 NLRB 627, 630 fn. 15 (1988) (noting that Sec. 7 protects an employee’s “right simply to ask for the presence of a fellow employee” at an investigatory interview); cf. *Epilepsy Foundation*, 331 NLRB at 678 fn. 10.

<sup>14</sup> Because we dismiss the complaint solely because Comer was not Nirsberger’s coworker within the meaning of *Epilepsy Foundation*, we need not pass on the Respondent’s alternative argument that Nirsberger had no reasonable fear of discipline during his meeting with Paley, or the judge’s finding that Comer was an inappropriate representative because he was geographically unavailable. We likewise observe that the facts of this case do not reach the issue of whether the policy basis of *Epilepsy Foundation* is ripe for reconsideration.

<sup>4</sup> 420 U.S. 251 (1975).

<sup>5</sup> Id. at 252.

<sup>6</sup> Id. at 260.

<sup>7</sup> 331 NLRB 676 (2000), enf. in relevant part 268 F.3d 1095 (D.C. Cir. 2001). Various amici curiae urge the Board to overrule *Epilepsy Foundation*. In view of the disposition herein, we find it unnecessary to address those contentions.

<sup>8</sup> Id. at 679.

<sup>9</sup> Id.

*Alfred M. Norek, Esq.*, for the General Counsel.  
*Bruce C. Bramley, Esq. (Pozefsky, Bramley & Murphy)*, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on November 13, 2001, in Albany, New York. The complaint herein, which issued on August 16, 2001, was based upon an unfair labor practice charge and an amended charge that were filed on June 25 and August 10, 2001, by Frederick Nirsberger, an individual. The complaint alleges that the Respondent discharged Nirsberger because he engaged in protected concerted activities, including requesting a representative during an investigative interview that he reasonably believed could lead to discipline, in violation of Section 8(a)(1) of the Act.

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent, a labor organization, admits and I find that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE FACTS

In February 1999, three local unions of the International Brotherhood of Electrical Workers (the International, Local 724) (Albany), Local 438 (Troy), and Local 166 (Schenectady) merged to become International Brotherhood of Electrical Workers, Local 236, AFL-CIO (the Respondent). At that time, the International appointed Bernard Mericle, who had been the business manager of Local 166, to be the acting business manager for the Respondent until an election of officers for the Respondent could be held. Nirsberger, who had been business manager/organizer for Local 438, was appointed by Mericle to the same position for the Respondent. Nirsberger and the other staff employees of the Respondent were members of the International, but were not represented by any collective-bargaining representative. Jerry Comer is an International Representative with an office in Syracuse, New York. He acts as a liaison between the International and specified locals, including the Respondent, handling disagreements within the local unions in his area. He does not have an office at the Respondent's facility, but he visits periodically, and is supervised by an International vice president. Dave Cox had been a supporter of Mericle in his election campaigns, and at the relevant times was employed as a collection officer for Local 438 Health and Benefit Funds, with an office at the Respondent's facility.

An election for officers of the Respondent was conducted in June 2000.<sup>1</sup> Timothy Paley, a former officer of Local 724, received five votes more than Mericle, but the International ordered a second election because objections to the election were filed with the International. A second election was conducted in September, which Paley also won, and he was sworn in as

business manager of the Respondent on September 8. Prior to the first election, Nirsberger supported Mericle by making telephone calls and distributing brochures on his behalf. Between the first and second election, Paley called Nirsberger and asked him for his support in the upcoming campaign, and Nirsberger told him that he intended to remain neutral in the campaign. Sometime between June and September, Nirsberger changed his mind and actively campaigned for Mericle.

The Respondent's constitution gives the business manager absolute authority to hire and fire representatives and assistants. At the time of the merger, Skip Goyette, from Local 166, Harold Joyce, from Local 724, John McCauley, from Local 438, and Nirsberger were the assistant business managers, and Don Rahm, Local 724, and Bob Shutter, Local 166, were the organizers. Mericle fired Rahm after the first election in June; Paley rehired Rahm after he won the election in September. In addition, Paley fired Shutter, Joyce, and Goyette after the September election; McCauley retired shortly thereafter. After the September election, Paley met with Nirsberger, who said that he couldn't believe that Paley won the election. Paley told him that the members were angry with the way the union had been operated. Because Paley felt that Nirsberger was smart, he felt that it would be in the best interest of the union to keep him on staff, which he did.

On November 13, Nirsberger left a note for Paley stating: "This is to inform you that I will be unable to be at work on Nov 20, 21 and 22, 2000 due to prior arrangements. Thank you." He went hunting on those days, Monday, Tuesday, and Wednesday, Thursday (Thanksgiving) and Friday (when the Respondent's office was closed). Paley had not spoken to him about these absent days prior to December 29. In a memo to Paley dated October 16, Nirsberger requested the week of October 23 for vacation. Paley answered that he couldn't give him that time off because he needed him for training and the upcoming national election. In about mid-September, Nirsberger, Paley, and Rahm were together, and Paley asked Nirsberger, "Is there any reason why you can't be here at 8:00 in the morning?" Nirsberger said, "No, absolutely none," and Paley said: "Everybody else shows up at 8:00, I want you here at 8:00." Paley agrees with the substance of Nirsberger's testimony about this conversation, and testified that it came about because other staff members had complained to him that Nirsberger was coming and going when he pleased. Nirsberger was absent from work on December 26 and 27, because he was ill, returning to work on December 28. On December 26, he called Cox and asked him to put a note in Paley's box saying that he was ill and wouldn't be at work. On December 28, Paley asked him where he was the last 2 days and he said that he had been sick. Paley then asked if he had told anyone that he was sick, and he said that he had asked Cox to put a note in Paley's box. Paley then told him that the next time that happens, he should call Paley directly, and he said that he would.

There was a meeting on December 29, of Paley, Rahm, and Nirsberger that is the basis of the unfair labor practice charge and complaint herein. Paley testified that because of the many

<sup>1</sup> Unless indicated otherwise, all dates referred to herein relate to the year 2000.

crises that had to be dealt with since September 8, he had not had an opportunity to sit down with his organizers to discuss a plan for the future. He decided to have a meeting with Nirsberger on December 29 "to outline a strategy so that the two newest organizers, Joe Hlat, who came from 166, and Mike Doyle, who came from 438 . . . I was going to ask that Fred give them the benefit of . . . the experience that he had."<sup>2</sup> He had no intention of disciplining him at this meeting. Paley asked Rahm to bring Nirsberger to his office. Rahm went to Nirsberger's office, told him that Paley wanted to see them, and they went to Paley's office. Nirsberger testified that Paley began the meeting by saying: "I understand you're putting your papers in for retirement." Nirsberger answered that he wasn't, but was considering it as an option. Paley then said: "You told me that you were going to remain neutral in the election and you didn't," and Nirsberger said, "That's correct." Paley then said: "I told you to stay away from Dave Cox and you didn't. I could have terminated you for taking those days off during hunting season." Nirsberger testified that he "didn't like the way this conversation was going" and that he thought that he was going to be fired, so he said, "I don't like where we're going with this. I'm not going to say another word until I have a rep here." Paley continued speaking, and Nirsberger said, "Listen, do you know what I'm saying, I'm invoking my *Weingarten* rights." Paley and Rahm said yes, and Nirsberger said that the conversation was over "until you get me a rep here." Paley asked, "Who do you want?" Nirsberger said, "I want Jerry Comer from Syracuse" and Paley picked up the phone and said, "I can arrange that." Paley started to speak again, and Nirsberger said, "I'm not saying another word until Jerry gets here, so when Jerry gets here I'll be glad to continue the conversation." He left Paley's office and stopped at Cox's door, which is next to Paley's, and told him that he had invoked his *Weingarten* rights in a meeting with Paley, and returned to his office. About 5 minutes later, Paley walked into his office, said: "For your information, *Weingarten* doesn't apply to you, you should have listened to my offer." Paley then left a termination letter on Nirsberger's desk. The letter states that, pursuant to the union's Constitution, he is discharged effective January 2, 2001.

Paley's testimony was not as clear and direct as Nirsberger's about this meeting. Initially, he testified:

I said, "I could have done a lot of things, I could have not hired you", I didn't actually say that, the gist of my conversation was, I could have done a lot of things and I didn't exercise my options." We could have—we wanted to come up with a game plan to try to best serve the members and Fred wouldn't allow any dialogue, he just absolutely refused to talk, everything was in mandate form, he—there was no opportunity for dialogue.

In answer to the next question from his counsel, he testified:

<sup>2</sup> In his affidavit given to the Board, Paley stated: "The purpose of the meeting with Nirsberger was to determine whether or not he would do his share of the work and be part of the team."

When Fred came in with Don, they sat down and I said to Fred, I said, "When you came in here, I could have terminated you", meaning in September, "but I didn't, you haven't done anything but issue mandates to me and I ignored the mandates."

He told Nirsberger that he could have terminated him for any reason. At some point, Nirsberger said that he didn't like where the discussion was going, and Paley asked to be allowed to finish, but Nirsberger said that he was invoking his *Weingarten* rights and asked if Paley knew what that was. Paley said he did, but "they don't apply here." Nirsberger said that he wanted some representation, and Paley pointed to Rahm and said, "Here's your Executive Board Chairman right here, but that's not what this is about." Paley told him that the union was in a terrible situation, and they had to unite for the good of the members, and that's what the meeting was about. Nirsberger again invoked his *Weingarten* rights and asked to have a representative present. Paley asked him who he wanted, and he said that he wanted Comer to be his representative. Paley said, "You can have anybody you want here, but I want to finish this conversation." Nirsberger said, "As far as I'm concerned, this conversation is over," and left Paley's office. As soon as Nirsberger left his office, Paley decided to fire him because, "he refused to cooperate with me, he wouldn't have any dialogue to help better the membership." He had a termination letter prepared for Nirsberger, and dropped it on his desk saying, "You should have listened to what I had to say." He testified that he did not fire him for invoking his *Weingarten* rights; he fired him because, "he would call anyone in the office, but me, he didn't demonstrate the respect or try to help the local union move forward in a positive fashion."

Rahm testified that Paley began the meeting by telling Nirsberger of a few occasions when he could have fired him. Nirsberger then said something like: "I don't like where this is going, I want to invoke my *Weingarten* rights. You know what that is." Rahm said that he knew what *Weingarten* rights were, but said that this wasn't a disciplinary meeting. He believes that Nirsberger said that he wanted a International representative to be present. Paley then attempted to continue the conversation, but Nirsberger interrupted, saying, "This conversation is not taking place, I want a rep here." Paley said, "You can have whoever you want, who do you want?" He does not recall Nirsberger naming Comer. Nirsberger then got up and walked out of the room. Paley said, "I can't deal with this, he won't talk to me."

William O'Connor, who had previously been a member of Local 438 and, as a result of the merger, has been a member of the Respondent, testified to an incident that occurred on September 3, 2001, after the regular monthly union meeting. There was a tradition at the time that union members went to a local tavern at the conclusion of the meeting. While there, he met Rahm and they discussed a number of subjects about the Respondent. At one point during this meeting, Rahm told him: "If Fred didn't ask for his *Weingarten* rights, he would still be here." O'Connor, who was surprised by this statement because he thought that Rahm knew that he was friendly with Nirsberger, responded, "You guys screwed him, but that's up to the

powers that be.” That was the extent of the conversation. Rahm did not testify about this conversation.

## II. ANALYSIS

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), the Supreme Court agreed with the Board that Section 7 gives an employee the right to refuse to participate in an interview with his/her employer without union representation, where he/she reasonably fears that it might result in discipline. The Court made a number of points in its decision: the employee must affirmatively request representation, and “the employee’s right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action.” The Court quoted from the Board’s Decision in *Quality Mfg. Co.*, 195 NLRB 197 at 199 (1972):

We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative.

The Supreme Court further stated that the “exercise of the right may not interfere with legitimate employer prerogatives.” The result is that, while the employee, in an appropriate situation, can refuse to continue with an interview without a representative, the employer may continue the investigation without the input of the objecting employee, “...thus leaving the employee the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one.”

The rights established by *Weingarten* for employees represented by a collective bargaining representative were extended to employees in nonunion workplaces by the Board in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000). In that case the Board found that an employer whose employees were not represented by a union violated Section 8(a)(1) of the Act by discharging an employee for demanding that a coworker accompany him to an investigatory interview.

Taking the instant matter step-by-step, it is clear that Nirsberger, a nonrepresented employee, was entitled to *Weingarten* rights pursuant to *Epilepsy Foundation*. The more difficult questions are whether he was entitled to invoke this right and, ultimately, whether his termination was unlawful.

The initial issue therefore is whether Nirsberger had a reasonable fear that the December 29 meeting with Paley and Rahm would result in discipline. I believe that he did. Whether you credit the testimony of Rahm, Nirsberger or Paley,<sup>3</sup> Paley’s opening statement to Nirsberger was: “I could have fired you...” Considering that Nirsberger had opposed Paley in the two recent union elections (after promising Paley after the first election that he would remain neutral), and had seen the other

agents who supported Mericle fired or, in one case, resigned, it was certainly reasonable for Nirsberger to fear for his job upon hearing Paley start the meeting by saying that he could have fired him earlier. In *Consolidated Edison*, 323 NLRB 910 (1997), the Board stated:

*Weingarten*—therefore requires an employer to evaluate an investigatory interview situation from an objective standpoint—i.e., whether an employee would reasonably believe that discipline might result from the interview. Consequently, it is no answer to this allegation of a *Weingarten* violation that the Respondent’s supervisors were only engaged in fact finding, or that they had no intention of imposing discipline on Hunter at the time of the interview. Neither of those conditions is inconsistent with Hunter’s reasonable belief that discipline could result from the interview.

In *Circuit-Wise, Inc.*, 308 NLRB 1091 at 1109 (1992), in a situation similar to the instant matter, the Administrative Law Judge stated:

The Respondent’s witnesses testified that the purpose of the meeting was not to administer discipline. However, this fact was not made known to Genus, and for that matter, the subject matter of the meeting was not made known to him. Genus testified that he believed that the meeting could result in discipline and I believe the objective evidence of record amply supports that view. He had previously been warned by Abate about smoking and told that discipline was not going to be administered at that time. He had published an article noting his support for the Union and encouraging employees to stand up for their rights, an action mentioned negatively by Abate. He had had a confrontation with Ames over not following Lech’s work assignment the day before, and he reasonably believed that management was aware of his August 6 letter. I find he reasonably feared discipline could result from the meeting based on objective evidence.

The instant situation is very similar. Although Paley and Rahm testified that the meeting was not meant to discipline Nirsberger, they never told him that at the meeting. Rather, Paley began the meeting by telling Nirsberger that he could have fired him earlier. That statement, combined with the events of the prior six months, were sufficient for Nirsberger to reasonably fear that the meeting would result in discipline.

O’Connor’s uncontradicted and credible testimony that Rahm told him in September 2001 that Nirsberger would still be employed by the Respondent if he had not asked for his *Weingarten* rights at the December 29 meeting goes a long way toward establishing that he was fired for engaging in protected concerted activities, invoking his *Weingarten* rights. However, there is more, principally timing. Although Paley testified that he fired Nirsberger because he would not cooperate with him or talk to him, that had been going on for almost four months. Yet he had not fired him earlier, but did so five minutes after he invoked his *Weingarten* rights. I therefore find that was the reason for the termination.

<sup>3</sup> Although there were few substantive differences between their versions of this meeting, because I found Paley to be the most evasive of the three and Rahm to be the most direct and believable, I generally credit them in the order of Rahm, Nirsberger, and Paley.

The final issue is whether the termination violated Section 8(a)(1) of the Act. This turns upon whether there was any defect in Nirsberger's request at the December 29 meeting. I credit Nirsberger's testimony that at the meeting, he said that the conversation was over "until you get me a rep here." When Paley asked whom he wanted, he said, "I want Jerry Comer from Syracuse." He testified further that Paley responded, "I can arrange that." On this point I credit Paley, whose testimony on this point is more reasonable and comports better with the facts. I therefore find that after Nirsberger said that he wanted Comer as his representative, Paley told him that he could have anybody he wanted to represent him, but he wanted to finish the conversation. In *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977), after being called into a meeting with his supervisor, the employee requested the presence of his shop steward at the meeting, even though he and his supervisor were aware that the shop steward was not scheduled to return from vacation for three days. The supervisor told the employee that the steward was away, and that he wanted to get the matter out of the way and did not want to hold it in abeyance until the steward returned. The Board stated:

there is nothing in the Supreme Court's opinion in *Weingarten* which indicates that an employer must postpone interviews with its employees because a particular union representative, here the shop steward, is unavailable either for personal or other reasons for which the employer is not responsible, where another representative is available whose presence could have been requested by the employee in the absent representative's place. Indeed, the Supreme Court was careful to point out that the exercise by employees of the right to representation at an interview may not interfere with legitimate employer prerogatives. Certainly the right to hold interviews of this type without delay is a legitimate employer prerogative.

The Board, in *Montgomery Ward & Co.*, 273 NLRB 1226 at 1227 (1984), citing *Coca-Cola*, stated:

when an employee requests a representative who is unavailable, the employer can deny the request and is not required to postpone the interview, secure an alternative representative, or otherwise take steps to accommodate the employee's specific request. The Board has held that in such circumstances the employee has the right and, indeed, the obligation to request an alternative representative in order to invoke the *Weingarten* protections.

In *Roadway Express, Inc.*, 246 NLRB 1127 at 1129 (1979), an employee was suspended for refusing to attend a meeting with his supervisor because of the unavailability of the union representative whom he wanted. In finding no violation, the Board stated: "Nowhere in *Weingarten* does the Court state or suggest that an employee's interest can only be safeguarded by the presence of a *specific* representative sought by the employee, as opposed to being accompanied by *any* union representative." In *Crown Zellerbach, Inc.*, 239 NLRB 1124 at 1126 (1978), the administrative law judge stated:

The United States Supreme Court did not define in *Weingarten* the characteristics that an employee representative must have. However, the Board has made it clear that there is no magic word or words to describe those characteristics. It is not necessary that the employer provide the employee the best representative possible. Further, no particular title need be held by the representative; he may be no more than a witness, in a proper case.

Nirsberger had the right to request to have a representative present at the meeting, and his request was for Comer. The problem with this request is that Comer was located in Syracuse, New York, approximately 120 miles from Schenectady, where the Respondent's office is located. Even if Comer were in his office at the time, and was willing to leave immediately, it would take at least 3 hours for him to get to the meeting. Paley told Nirsberger that he could have any representative whom he wanted (even recommending Rahm, perhaps a Hobson's choice), but he wanted to finish the conversation and *Coca-Cola* says that he had that right. *Epilepsy Foundation* gave Nirsberger the right to have a representative present with him at the meeting; however, under the circumstances present at that location, whom could he choose? *Material Research Corp.*, 262 NLRB 1010 (1982), which was overruled by *Sears, Roebuck & Co.*, 274 NLRB 230 (1985), in granting unrepresented employees *Weingarten* rights, discussed the fact that since the employees were not represented by a union, their representatives at these meetings would have to be coworkers or fellow employees. Such an individual, Cox, had an office next to Paley. As Nirsberger went to Cox's office immediately after leaving Paley's office on December 29 to tell him what had occurred, and as Cox supported Mericle in the elections, presumably, he and Nirsberger were friends. He could have been called to be Nirsberger's representative at the meeting and there is no evidence that Paley would have objected to his presence. Nirsberger never explained why he did not request Cox, rather than Comer. I therefore find that because Nirsberger requested to have Comer as his representative, which would have required, at least, a three hour delay in the meeting, and did not designate an alternative even though Paley told him that he could have anybody whom he wanted, the Respondent was not obligated to delay the meeting. The Respondent therefore did not violate the Act by terminating Nirsberger when he refused to continue the meeting.

#### CONCLUSIONS OF LAW

1. The Respondent, a labor organization, has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent did not violate Section 8(a)(1) of the Act as alleged in the complaint.

On these findings of fact, conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

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<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

#### ORDER

Having found that the Respondent has not engaged in the unfair labor practices alleged in the complaint, the complaint is dismissed in its entirety.